

Chaturvedi (Migration) [2018] AATA 1904 (27 April 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Tushar Chaturvedi

CASE NUMBER: 1622620

DIBP REFERENCE(S): CLF2013/209783 CLF2017/64351

MEMBER: Adrienne Millbank

DATE: 27 April 2018

PLACE OF DECISION: Brisbane

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 27 April 2018 at 5:00pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Whether a genuine spousal relationship exists – Witness credibility – Vague and inconsistent evidence – Where evidence contrived in order to secure a migration outcome

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359A, 375A

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cl 820.211(2)(a), 820.221, Schedule 3, Criterion 3001

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 16 December 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 29 August 2013 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211. The Delegate was not satisfied that the applicant was the spouse or de facto partner of the sponsor, as defined under section 5F and 5BC of the Migration Act.
4. The applicant appeared before the Tribunal on 28 March 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and two supporting witnesses.
5. Further evidence was provided on 29 March 2018, 3 April 2018, 4 April 2018, 5 April 2018, 17 April 2018 and 26 April 2018.
6. The applicant was represented in relation to the review by his registered migration agent, who did not attend the hearing.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The applicant was born in India in 1990. His immigration history is as follows:
 - He first arrived in Australia on 19 February 2010 on a Student (subclass 572) visa.
 - He lodged a second Student (subclass 572) visa application on 4 April 2011, which was refused on 14 June 2011.
 - On 11 July 2011 he applied for review of the decision to the then Migration Review Tribunal. The MRT affirmed the decision on 9 January 2013.
 - On 5 February 2013 he applied for ministerial intervention. An outcome of 'Not Considered' was recorded on 17 May 2013.
 - He lodged the Partner visa application on 29 August 2013. It was refused on 24 September 2014 on the grounds that the applicant did not meet cl.820.211(2)(d)(ii). As the applicant had not held a substantive visa since 4 April 2011, when his first Student (subclass 572) visa ceased, he was found not to meet Schedule 3 criterion 3001.
 - He appealed to the Tribunal on 29 October 2014. The Tribunal remitted the decision on 4 August 2016.

- On 16 December 2016 the Department refused the application again, this time on the grounds that the applicant did not meet subclause 820.211(2)(a). As noted, the Delegate was not satisfied that the applicant was in a genuine spousal relationship with the sponsor.
9. The sponsor was born in New Zealand in 1986, and has lived in Australia since 1996. She declared no previous relationships. The applicant declared one previous marriage, which ended in divorce in March 2013.
 10. The parties claim they met in March 2011, and moved in together five or six months later, in August or September 2011. They claim they purchased a house together in Springfield Lakes in January 2013. They married on 11 June 2013.
 11. In response to a request by the Delegate for information as to his reason for not lodging his Partner visa application before his last substantive visa ceased, the applicant advised the Department, in an email dated 1 October 2013:

The extension for my student visa got rejected in 2011 and I applied for the review (MRT). It took almost one and a half to two years for my MRT file to be opened. All this process for MRT and then Ministerial Intervention took almost 26 to 29 months. While I had one visa consideration application in immigration I was not able to apply for my partner visa application earlier.
 12. At the Tribunal hearing, however, the applicant acknowledged that he understood he could have withdrawn his appeals related to his Student visa refusal and applied for a Partner visa. He stated that he pursued his request for Ministerial Intervention on the advice of his then agent.
 13. The issue in the present case is whether the applicant and the sponsor were in a genuine spousal relationship at the time of application and this decision.
 14. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the applicant claims to be the spouse of the sponsor who is an eligible New Zealand citizen.
 15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.
 16. A copy of a Queensland Marriage Certificate was provided, certifying that the parties married on 11 June 2013 at the General Registry Office, Brisbane. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

Financial aspects of the relationship

17. Statements of transactions from June 2013–September 2016 were provided from the parties' joint bank account. They show that the applicant's salary, when he had work rights, was deposited into the account, but not the sponsor's. At hearing the sponsor confirmed that she has her own personal bank account, into which her earnings, from her work at a salad-preparing business, have been deposited. The statements show that the joint account was used for a lot of one-person type transactions, such as a lunch meal, or petrol. They do not show that the account was used to establish or manage a joint household, for example through the regular payment of a mortgage, or rent, or utilities, or the purchase of significant household items.
18. The statements also showed a large number of transfers into and out of other accounts; a large number of cash withdrawals; and regular large deposits in the order of \$1000–\$3000. At hearing the applicant confirmed that these large amounts were transfers of funds by his father. He advised that it was more cost-effective to send money internationally in large sums, and that his father provided money for him on request, as when he needed it. He advised that his father was a wealthy and important person, who owned a large seed business, and was a Minister in the Provincial Government.
19. The Tribunal asked the sponsor why she made occasional deposits into the joint account, of mostly small amounts between \$10 and \$60, and, several times, up to around \$500. The Tribunal pointed out that nearly all of her deposits were inconsequential compared with the larger deposits and transfers of funds made by the applicant and his father. The sponsor stated that her deposits showed that the parties were saving, together. She acknowledged that the joint account was used by the applicant for his day-to-day living expenses; that she managed her own personal bank account; and that she and the applicant had not in fact amassed any significant savings.
20. In a letter to the Department dated 1 October 2013, the applicant claimed: 'In January 2013 we bought a house together in Springfield Lakes on finance. Buying our own house and starting a family was her dream and I wanted to fulfil it for her'. At hearing the applicant acknowledged that he and the applicant had not, in fact, obtained finance and purchased a house together. He claimed that they had, rather, entered into a private rent-buy type agreement. No evidence was provided of this agreement. The parties confirmed at hearing that they are not in fact purchasing a house together, and that they have no joint assets or liabilities.
21. The Tribunal accepts that the parties have had a joint account since June 2013, but notes that it appears to have been used only or mainly by the applicant, apart from occasional, mostly small, deposits by the sponsor. The Tribunal notes that the applicant is supported financially by his father, and that he described at hearing a source of supplementary income, namely, buying and selling puppies.
22. The Tribunal does not accept, and the evidence does not support, the parties' claim that the applicant has been fully supported financially by the sponsor while without work rights. The Tribunal is not satisfied, because the evidence does not support, that the parties have pooled financial resources and shared day-to-day expenses, as would be expected in a marriage of nearly five years and a live-in relationship of nearly seven years.

Nature of the household

23. As noted above, the parties claimed to have purchased a house together in January 2013, but acknowledged at hearing that this was not correct. They provided copies of rental agreements. In one, for the period 24 March 2016–15 March 2017, the applicant is listed as tenant number one; another person with an Indian name is listed as tenant number two; and the sponsor is listed as tenant number three. In another, from 9 March–9 September 2018, the sponsor is listed as tenant number one; a member of the sponsor's family is listed as tenant number two; and the applicant is listed as tenant number three. Another, purporting to be for a fixed period from 2 December 2012–3 December 2017, with no bond requirement, was in the names of the applicant and the sponsor.
24. No evidence was provided that the parties purchased any significant household items for the houses they were joint tenants in. They claimed they shared the cooking and cleaning, and the applicant claimed that he cared for his dogs. Results of the parties' initial IVF consultation and tests were sent to them at the same address. At hearing the applicant confirmed that they have shared their rented accommodation with other tenants.
25. The Tribunal asked the parties about a relationship goal declared at the time of application, in 2013, which was to start a family together. The sponsor stated that she had decided to wait, before starting a family, until she is in a more financially secure situation. The Tribunal asked why, in that case, she had undertaken at least two cycles of IVF treatment, as she claimed in her letter to the Immigration Minister signed 21 December 2016. The sponsor stated that 'the lawyers' told her that 'she had to'. The applicant explained that the parties 'agreed' to the IVF because 'the lawyers' he consulted about his visa told him his 'only options', following the Department's refusal of the Partner visa application, were to 'have a kid', or obtain evidence of medical intervention in pursuit of this goal. The applicant then clarified that the parties had in fact undertaken only one cycle of IVF. On the evidence provided, which was of initial fertility tests, no embryos were harvested or transplanted.
26. The Tribunal accepts that the parties have shared addresses since their marriage in June 2013, and that they have contributed to the housework while in the same shared houses. The Tribunal is not satisfied, on the evidence provided, that they have established a joint household as a married couple, where, as they claimed at the time of application, they intended to have and bring up children.

Social aspects of the relationship

27. Statutory declarations were provided at the time of application from a former house-mate and work colleague of the applicant, who declared in two sentences that he had observed the parties to be in love; and a friend of the sponsor who declared in five sentences that she saw the parties every week and had observed them to be in love. The Tribunal places little weight on these declarations because of their brevity and the generality of the observations.
28. A copy of an undated letter, from the Senior Pastor of the Church of the Global Guardian, addressed to the Department of Immigration and Border Protection Services, was provided to the Tribunal. In this letter the Senior Pastor advised that the parties were 'active members of the Church', and 'honest and trustworthy individuals'. The Tribunal accepts that the sponsor's family were long-term members of the church, as the sponsor's father was a Pastor. The Tribunal does not accept the Senior Pastor's advice regarding the applicant's level of involvement in the Church. At hearing, the applicant swore a Hindu oath; advised that he had not converted to Christianity; and stated that he attended the sponsor's Church only occasionally, as a social event. Further, the Tribunal does not accept the Senior Pastor's character references, because of dob-in information (discussed below), advising that the applicant provided misleading information to the Department and was in a contrived

relationship; and because the Tribunal itself found the parties to have provided misleading and conflicting information (also discussed below).

29. Photos were provided of the parties' wedding ceremony and reception, held in September 2016, when the applicant's parents visited him in Australia. The applicant advised that his father hosted and paid for this wedding, for which there was live entertainment, and which was attended by over one hundred of the sponsor's family, many of whom travelled from New Zealand for the occasion.
30. The Tribunal expressed its surprise to the applicant regarding this event. In his letter to the Department dated 1 October 2013, the applicant had stated that his parents 'would never accept my wife'. The applicant advised at hearing that his parents are high-caste, and remained disapproving of his choice of a wife. He stated that over time, however, they got used to the idea, and decided to come to Australia to celebrate the marriage. The Tribunal notes the dob-in information (discussed below), provided to the Department in October 2016, included that the applicant's parents did not want the applicant to bring the sponsor to India as 'they don't want her as their daughter-in-law'.
31. The Tribunal accepts that the parties are known by family members to have married, and that their friends and a former house-mate and colleague and the Senior Pastor at the sponsor's church, support the visa application. The Tribunal accepts that the applicant's parents travelled from India and hosted a lavish wedding for their son. The Tribunal nevertheless, for the reason of the applicant's former statements regarding his parents' rejection of the marriage; the lack of supporting statements from the applicant's parents; and the dob-in information, is not satisfied that the parties are recognised by close friends and immediate family members as being in a genuine married relationship, rather than a relationship contrived for the purpose of obtaining a visa.

Nature of persons' commitment to each other

32. On his application form the applicant declared that the parties first met at a social occasion. At hearing, when asked how they first met, he stated that he established contact with the sponsor through an internet dating site. When asked at hearing why he didn't return home following his failed studies, and what his intentions were at the time, the applicant stated that he was following the advice of his agent at the time that he could switch to a permanent visa once in Australia. He confirmed that he came to Australia with the intention of staying here, for the reason that he thought that Australia could offer him better life opportunities, and that his initial plan, to switch to a work visa, 'didn't work out'.
33. When the Tribunal asked the applicant about his future plans, he stated that his father had agreed to set him up in his own business in Australia, but only after he is granted a permanent visa. He stated that his friend, who provided witness testimony at the hearing, was going into business with him. He stated that it was his and his friend's intention to open a health-food café near the gym where his friend works. He made no mention of the sponsor when discussing his plans. He stated further that he didn't want to return to India because he would be expected to work in his father's seed business, and that his father would not agree to set him up in business in a city like Mumbai, which would have been more agreeable to him.
34. The Tribunal found the applicant evasive when responding to questions about his first marriage: he claimed he could not remember when he married, but thought that he divorced in 2011 or early 2012. The sponsor stated that she knew nothing about the applicant's first marriage, but thought that he divorced in 2012. A copy of the applicant's divorce certificate, provided after the hearing, showed the applicant married his first wife on 18 October 2010, and that the marriage was terminated on 27 March 2013. This overlaps the period (from

March and August 2011), when the parties claimed to be courting and living together as a de facto couple, and the Tribunal does not find it credible that the parties would not know or remember that the applicant obtained a divorce in the months leading up to their marriage.

35. In a letter to the Immigration Minister dated 21 December 2013, the sponsor claimed that the fact that she had supported the applicant financially, on her meagre earnings as a casual worker in a salad-preparing business, was evidence of a genuine relationship. She claimed that she had given up her gym membership because she could not afford it, but continued to pay for the applicant's 'from my accounts and salaries', thus 'sacrificing her health and living' for her husband's sake. She further claimed that that she and the applicant had suffered through days of hunger together because she could not afford to buy enough food for them both, and this was further proof of a durable and genuine relationship.
36. As discussed above, on the evidence provided, the applicant's father has supported him financially, through sizeable and regular transfers of funds. On his own admission, the applicant asked for and received however much he needed from his father. At hearing, neither the sponsor nor the applicant had the appearance of having been nutritionally deprived. As noted above, there is no evidence, apart from small and occasional deposits into a joint account, that the sponsor contributed anything, financially, to the applicant or the claimed relationship. The Tribunal finds the sponsor's claims regarding her impoverishing and health-endangering commitment to the applicant, unconvincing.
37. The sponsor at hearing advised that she had not had a driver licence for some years. She stated that she lost it for driving under the influence, and driving without a licence. She advised that she could renew it only after she had paid off a fine, but that this was a lengthy process, as she could only afford to pay it slowly. She indicated that she had no expectation that the applicant would pay or help to pay her fine. The Tribunal notes that the sponsor has purportedly married into a wealthy and important family, and finds the parties' lack of involvement in each other's financial affairs to be not indicative of a genuine spousal relationship.
38. As noted above, the Department received, in late 2016, information in the form of a dob-in, from an individual who provided evidence that he or she knew the parties and was familiar with their circumstances. The gist of this information was: the applicant provided false information to the Department about his claimed relationship; he presented himself on Facebook as single; he told people that he was in a fake marriage; the sponsor had also told people that she was in a fake marriage; and the applicant had been in other relationships 'for the last few years'.
39. On 17 April 2018, the applicant responded to the s.359A letter inviting his response or comment on this information, and his comment on the validity of the s.375A certificate protecting the details of the information. The applicant made no comment on the validity of the certificate. Regarding the dob-in information, he stated that neither he nor the sponsor understood why anyone would have provided information which was 'false and malicious', and premised that it must have been a person who was jealous of their relationship.
40. In his response of 17 April 2018 the applicant provided also: a statutory declaration from himself; a letter from the sponsor signed before a JP; numerous supporting statutory declarations from family members of the sponsor, and friends; further photos of the parties together in their rented house; signatures on a petition of support from 'our church'; and signatures, mainly from family members and friends, on an on-line petition.
41. The Tribunal accepts that family members and friends of the applicant and the sponsor support the visa application.

42. The Tribunal acknowledges that a differently constituted Tribunal found that the applicant provided emotional support to the sponsor, including by accompanying and encouraging the sponsor to seek help from health professionals at a time when she suffered from anxiety and depression and had little family support, in 2014. The Tribunal notes that this differently constituted Tribunal made no findings as to whether the sponsor and the applicant were in a genuine spousal relationship.
43. The Tribunal accepts, including from the photographic evidence, that the applicant has provided companionship and emotional support to the sponsor. Having considered the further submissions and evidence, however, the Tribunal remains unsatisfied that the parties have provided each other with the sort of companionship and emotional support that would be expected in a genuine spousal relationship. Having considered the circumstances of the applicant and all the evidence, including the dob-in, as discussed above, the Tribunal is not convinced that the parties see the relationship as long-term.

Other relevant considerations

44. The applicant on his own admission arrived in Australia with the intention of staying here. On his own admission, he has manipulated his circumstances in pursuit of a migration outcome. He lodged an appeal for Ministerial intervention in order to buy himself more time to organise a further visa application. He obtained evidence of IVF treatment on the advice of 'the lawyers', that 'having a kid', or evidence of medical intervention in pursuit of this goal, was 'the only option' for him to obtain a Partner visa.
45. The applicant provided misleading testimony regarding the inception of the relationship and the timing of his first marriage and divorce; and the sponsor provided exaggerated and misleading testimony regarding her claimed financial commitment and sacrifices for the applicant. Misleading advice was provided regarding the parties claimed purchase of a house in January 2013.
46. The Tribunal considered the applicant's response to the dob-in. The information however was from an informed source and the Tribunal finds it credible.
47. Having considered r.1.15A(3) matters and the circumstances of the parties, as discussed above, the Tribunal is not satisfied that the parties have a mutual commitment to a shared life to the exclusion of others; that they are in a genuine and continuing relationship; or that they intend to live together and not separately and apart on a permanent basis.
48. On the basis of the above, the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made or the time of this decision.
49. Therefore the applicant does not meet cl.820.211(2)(a) or cl.820.221.
50. Alternative criteria in cl.820.211(7), 820.211(8), 820.211(9), 820.221(2), 820.221(3) (death, family violence, child exceptions) are not relevant to the circumstances of the applicant, and he has made no claims against these criteria.
51. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.
- 52.

DECISION

53. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).